

No. 78-484

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH M. O'CALLAGHAN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

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Petitioner, a former Captain in the United States Army, contends that the Court of Claims erred in dismissing, on the ground of laches, his petition for medical disability pay.

1. Petitioner appeared before an Army Physical Evaluation Board, which concluded that he was 40% disabled, and that 20% of his disability was attributable to problems existing prior to his entry into active service (Pet. 4). Accordingly, petitioner was honorably discharged in April 1970 with severance pay, but without entitlement to disability retirement pay (Pet. App. 2). The Board for Correction of Military Records denied petitioner's application to correct these records in October 1973 (*ibid.*).

On March 30, 1976—five years, 11 months, and 27 days after his discharge—petitioner filed this action in the Court of Claims, contending that the Army's determina-

tion of his disability was arbitrary, capricious, and denied him due process of law; petitioner also argued that the Army failed to follow applicable statutes and regulations. The government responded that petitioner's claim was barred by laches, that the Army's actions were proper, and that there had been no procedural violations. On cross-motions for summary judgment the Court of Claims held that the existing administrative record was insufficient to determine the merits of petitioner's claim, but it granted the government's motion for summary judgment, finding that petitioner's claim is barred by laches (Pet. App. 3-5).

2. Petitioner contends (Pet. 6-8) that the Court of Claims erred in holding his claim barred by laches because, in his view, the government failed to show any prejudice as a result of the delay.

The Court of Claims considered the reason for and length of the delay, and the prejudice resulting from it. Finding that one of the primary factual issues raised by petitioner's claims was whether certain physical conditions were present at the time of his entry on active duty in 1967 (Pet. App. 2-3), and that petitioner's suit was not commenced until 1976, approximately nine years later, the court concluded that the government's defense would necessarily be prejudiced by petitioner's delay (Pet. App. 4):

Witnesses' memories as to [petitioner's] case will undoubtedly have dimmed and may not be able to be refreshed by the contemporaneous written records; some witnesses may no longer be available; for all medical witnesses it will be hard, if possible at all, to reconstruct [petitioner's] medical condition of six or more years ago.

Moreover, the court also found (*id.* at 3) that petitioner, who is a lawyer, had offered no justification for the delay. Balancing all these factors, the court concluded that

petitioner's claim should be dismissed (Pet. App. 4). Given the lengthy delay, a lesser showing of prejudice was sufficient. " [T]he longer the delay the less need there is to search for specific prejudice and the greater the shift to plaintiff of the task of demonstrating lack of prejudice." *Brundage v. United States*, 504 F. 2d 1382, 1386 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975), quoting *Cason v. United States*, 471 F. 2d 1225, 1229 (Ct. Cl. 1973). Cf. *Frommshagen v. United States*, 573 F. 2d 52 (Ct. Cl. 1978).

Petitioner further contends (Pet. 9-10) that the Court of Claims upheld the Physical Evaluation Board's findings even though the court concluded that these findings were not supported by the record. This contention is based on a misunderstanding of the Court of Claims' decision. The court found that the record before it on the cross-motions for summary judgment was not sufficient to resolve petitioner's claims of error, which raised various issues of fact (Pet. App. 3). The court did not, as petitioner suggests, go further and conclude that the record before the Board of Physical Evaluation was insufficient to permit *the Board* to determine petitioner's claim for disability retirement pay in the first instance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978